BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,351

ALASKA STEAMSHIP COMPANY, ET AL.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDER OF THE
FEDERAL MARITIME COMMISSION

DONALD F. TURNER
Assistant Attorney General

IRWIN A. SEIBEL
Attorney

Department of Justice

M. C. MISKOVSKY
Solicitor

WALTER H. MAYO III
Attorney

Federal Maritime Commission

December 15, 1965
Washington, D. C.

TABLE OF CONTENTS

TABLE OF CASES CITED

COUNTERSTATEMENT OF THE CASE

This litigation is before the Court a second time. The case has its roots in a rate investigation commenced by the Commission in its Docket Nos. 969 and 1067, Alaskan Seasonal Rate Increases (1962), which resulted in two orders of the Commission dated March 5, 1964, and May 12, 1964. In the previous litigation this Court reviewed the two orders, set them aside, enjoined their enforcement, and remanded the proceedings to the Commission. Alaska Steamship Company, Inc., et al. v. Federal Maritime Commission and United States, 344 F.2d 810.

The instant review suit was initiated to review the Commission's order entered pursuant to the remand of this Court. In an order dated August 19, 1965, the Commission made certain corrections in the income tax allowance of Alaska Steam, pursuant to this Court's direction, and at the same time it denied a renewed motion to reopen the Commission proceedings for the reception of further evidence. The petition to review followed on September 7, 1965. After oral argument, the Court on November 17, 1965, denied petitioners' application for interlocutory injunction, without prejudice, and passed the application to adduce additional evidence to the hearing on the merits.

The issues now before the Court are: (1) Whether the denial on August 19, 1965, of Alaska Steam's motion to reopen was such an abuse of discretion as to warrant reversal by this Court; and (2) Whether the Commission carried out the Court's mandate in recomputing Alaska Steam's income tax.

ARGUMENT

I. THE MOTION TO REOPEN

On the prior review proceeding, the Court found it unnecessary to decide whether it was an abuse of discretion for the Commission to deny petitioners' request to reopen to receive operating results for 1962 and 1963. The Court noted that another year had passed since the earlier motion had been made and that the proceeding must in any event be reopened on the remand ordered on other grounds. In the light of these circumstances, the Court felt that any objections based on the ground that reopening would further delay the termination of the proceeding were entitled to less weight. The Court therefore returned the case to the Commission with directions to give petitioners "the opportunity to again move for a reopening to receive later operating figures," although expressly observing that it would not necessarily be an abuse of discretion for the Commission not to reopen the investigation for this purpose (R. 209).

On remand, the Commission denied petitioners' renewed motion to reopen. In refusing to reopen, the Commission pointed out that only in the rare case[1/] are private litigants entitled to rehearings to bring the record

---

1/ The cases support the Commission's view that it has broad discretion in deciding whether or not to reopen to let in later operating results, and that its discretion should not be invoked to grant reopenings except for "unusual and weighty reasons" (R. 231). See cases cited in the Commission's Order, R. 229-230. The Court's attention is also invited to two additional cases not cited there. In Wilson and Co. v. United States, 335 F.2d 788, at 799 (7th Cir. 1964), the court of appeals held that there was no showing that the Federal Communications Commission abused its discretion in not reopening a Commission proceeding to receive further testimony. And, in Virginia Petroleum Jobbers Association v. Federal Power Commission, 293 F.2d 527, at 529 (D. C. Cir. 1961), the court of appeals held that the Federal Power Commission did not abuse its discretion by denying a reopening so that the petitioner could show rate changes which might have affected the feasibility of a pipeline project.

up to date and, in the Commission's view, this was not such a case. The Commission re-emphasized that the 1962 test year used in the Commission investigation was still a typical year.

Petitioners have not challenged this finding. Instead, they sought to put before the Commission later operating results which they claim to have been "disastrous." But, even if their claim were correct, the question would still be whether the test year was fairly representational of petitioners' operations. Operations in the seasonal service tend to run in four-year cycles; the first year of the cycle showing the most profitable results, and each succeeding year reflecting a progressive decline in profits, so that at the end of the fourth year the profits are smallest or there may be losses. Thus, the second or third years tend to be the average years. In the Commission's view, the 1962 test year was such a year and, in re-emphasizing that this year was still "representational," the Commission sought to respond to the Court's statement that "with the passage of each year, the 1962 test year becomes more and more vulnerable to the charge of staleness" (R. 209).

The Commission was also of the view that since the test year was representational a reopening to let in later figures--apart from the unlikelihood of affecting the results--would create a substantial delay in terminating the proceeding. Reopening would not be a perfunctory matter, the Commission believed, because receipt of further evidence would be in

an adversary proceeding with examination and cross-examination of witnesses, briefs, an Initial Decision, Exceptions, Replies to Exceptions, Oral Argument, and a final decision (R. 229). Furthermore, the Reply of the State of Alaska (R. 220) indicated that the State would contest the receipt of further evidence. The issue as to reopening was unlike the income tax question which was simultaneously remanded, because the latter issue required no more than a mathematical recomputation for its resolution.

The Commission also pointed out that allowance of petitioners' petition to reopen might result in a situation where pending rate cases could be indefinitely prolonged for the purpose of continually bringing the record up to date. As the Supreme Court observed in Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503 (1944):

> One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. 322 U.S. at 514.

The instant case furnishes a dramatic example of repeated efforts at each stage of the proceedings to reopen the record for the purpose of letting

[illegible]

[illegible]

[illegible]

[illegible]

in yet later operating results.[2/]

An additional consideration noted by the Commission in disallowing petitioners' motion to reopen was that petitioners could readily avail themselves of the conventional remedy of filing new tariffs showing rate increases, if they felt that operating results subsequent to the test year were typical and warranted the increases (R. 231). Petitioners contend (Br. p. 10) that they could not file increased rates because the May 12, 1964, Order of the Commission specified rate decreases, not increases. Petitioners, however, overlook the fact that they sought and obtained an injunction against the effectiveness of the Commission's orders under review, with the result that the May 12th order was being stayed during the pendency of the review proceedings, and thus petitioners could have filed new tariffs at any time. The fact that they were

---

2/ At the end of the hearings held before the trial examiner, petitioners moved to have the record held open until March of 1963 for the receipt of operating results for November and December, 1962. This motion was denied. At the oral argument held before the Commission in November of 1963, the request was expanded to include results for all of 1963, but the Commission declined to grant the motion. After the issuance of the Commission's Report and first order, petitioners again moved to reopen, expanding their request to the year 1964. In its second order of May, 1964, the Commission denied the Motion (R. 119). During the previous review proceeding, petitioners filed an application to adduce additional evidence, which sought to let in results for 1962-1964 and prospective results following the date of the reopened hearing, if and when it was held. The Court passed that application to the hearing on the merits, and it was later denied without prejudice. On remand, the motion to reopen was renewed and included 1965 as well as all previous years. In the order now under review, that motion was denied (R. 227). In the instant review proceeding, another application to adduce additional evidence was filed which further expanded petitioners' previous motions to include evidence "for the year 1965 to the date of taking of such evidence . . . together with evidence of anticipated operation thereafter, ..." (Application, p. 2). This motion is now before the Court for consideration.

not prevented from filing new tariffs was repeatedly brought to petitioners' attention by respondents' counsel at the hearing on the first application to adduce additional evidence in August, 1964, and at the hearing on the merits in January, 1965.

Finally, contrary to petitioners' suggestion (Brief, p. 7), the issue is not whether the Commission's denial of the previous petition to reopen was an abuse of discretion. The issue is whether the August 19th denial of the renewed motion is an abuse of the Commission's discretion. On this issue the Commission is plainly not foreclosed from amplifying the reasons given in connection with its denial of the previous petition. For, contrary to petitioners' contention, this Court did not hold that the Commission was in error in denying the previous petition. The Court expressly declined to pass on the Commission's ruling in this respect,[3/] and it held only that, in view of the circumstances present at the time of its decision, petitioners should be given an opportunity to renew their petition to reopen. The Court invited the Commission to re-examine its reasons for denying the previous petition in the light of the circumstances adverted to by the Court, and as noted above, the Commission has done this, and it has also advanced additional reasons for denying the renewed motion.

3/ Neither the petition for rehearing filed in the previous review proceeding by the Commission nor the application for stay of mandate were in any way related to the Court's ruling that petitioners should again be given an opportunity to move for a reopening. The Commission requested rehearing on the sole question of income tax accounting, and consideration was being given to a petition for certiorari on this ground. Obviously the Commission has never suggested that its discretion in disposing of motions to reopen is absolute or that the Court is not free to review such dispositions.

II. THE INCOME TAX COMPUTATION

The primary reason for the remand to the Commission was to correct the income tax allocation for the seasonal service. The Court found that the Commission's action in using a 20-year life for income tax purposes while at the same time using a 25-year life for vessels for rate base purposes was arbitrary action necessitating a remand. Accordingly, the Commission undertook to recalculate the depreciation for income tax purposes, and the calculation is set out in the Commission's order (R. 232). The figures are shown in detail, and petitioners do not contend that the Commission has incorrectly computed the adjustment for depreciation. They do contend, however, that the Commission has made several other errors, none of which were contested in the previous review proceeding.

Respondents submit that petitioners should not now be permitted to raise issues which were not contested before the Commission or this Court during the first review proceeding. However, if the Court decides to examine these additional questions, it is respondents' position that they were all correctly decided by the Commission. Petitioners first contend that the Commission erred in its August 19th order in not correcting the allocation of administrative and general expense to the charter operation. The charter operation has no affect on the seasonal service except insofar as the profits or loss from it affect the income tax paid by Alaska Steam. The Commission has no jurisdiction over the charter operation, and thus

allocations of administrative and general expense made to it were not altered by the Commission in its original orders, and Alaska Steam did not raise any questions as to the charter operation during the course of the previous litigation. The total amount of administrative and general expense claimed by Alaska Steam was $1,661,042, of which $1,625,330 was allocated between the seasonal and scheduled services. As the allocations made by the Commission were upheld by this Court (R. 198-199), no changes were necessary in the August 19th order.

Petitioners also contest the Commission's deduction of an interest item of $13,015 in the computation of income tax. That item represents interest paid on vessel mortgages during the test period, and it is included as a deduction in Alaska Steam's calculation of income tax. See Exh. 3-B-5. Obviously, if the carrier intended to deduct the item for income tax purposes, the Commission should also deduct it when calculating income taxes for the purpose of determining a rate of return. The fact that the item was disallowed as an expense for rate making purposes is irrelevant; the disallowance of the item for rate making purposes followed the Examiner's action (R. 56) and previous Commission practice. See General Increases in Alaskan Rates and Charges, 7 F.M.C. 563, at 575 (1963).

Finally, petitioners argue that the offshore charter operation should not have been treated as a separate service but should be considered as part of the seasonal service to determine the profit of the seasonal

service. This is a novel argument, advanced for the first time at this stage of the litigation. Suffice it to say that the Commission has no jurisdiction over the offshore charter operation, Alaska Steam itself treated the operation as a separate service, and the matter was not challenged in the previous review suit.

III. THE ISSUE OF CONFISCATION.

Petitioners contend that the August 19th order results in the confiscation of their property without due process of law. If the Commission did not abuse its discretion in refusing to reopen the record, and if petitioners have been given a fair rate of return, based on the figures of the test year, there is no confiscation. Petitioners' entire argument is premised on the case of Baltimore and Ohio Railroad Co. et al. v. United States, et al., 298 U.S. 349 (1936) which involved rate divisions ordered by the Interstate Commerce Commission. In that case, the railroad was powerless to alter the divisions and was required to serve the public at the rates prescribed. In the instant case, which is a far cry from the Baltimore and Ohio case, petitioners can file increased tariffs on thirty days' notice and thereby resolve their financial difficulties, if in fact any do exist.[4/] This is not the case where petitioners are compelled to serve the public at the rates prescribed if in fact they feel the rates should be raised, and this is not the case where compliance

4/ See Respondents' Affidavit In Opposition To The Application For Interlocutory Injunction filed in this cause.

with the Commission's order results in a refunding procedure. The Intercoastal Shipping Act, 1933, does not include a provision for refunding overcharges, and thus petitioners will be able to retain 100 percent of revenues heretofore collected.5/

CONCLUSION

The order of the Commission should be affirmed.

Respectfully submitted,

Donald F. Turner
Assistant Attorney General

Irwin A. Seibel
Attorney

Department of Justice

M. C. Miskovsky
Solicitor

Walter H. Mayo III
Attorney

Federal Maritime Commission

Washington, D. C.
December 15, 1965

5/ Absent, of course, any complaints for reparations filed by shippers.

CERTIFICATE OF COUNSEL AND OF SERVICE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

I further certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing via first class airmail, postage prepaid, three copies to each party or its attorney.

Dated at Washington, D. C., this 14th day of December 1965.

Walter H. Mayo III
Attorney
Federal Maritime Commission.